Filed 7/22/19 In re E.M. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

In re E.M. et al., Persons Coming Under the Juvenile Court Law.	C088322
EL DORADO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. K.M. et al., Defendants and Appellants.	(Super. Ct. Nos. SDP20160018, SDP20160019)

The parents of minors E.M. and A.M. appeal from the juvenile court's orders terminating parental rights and freeing the minors for adoption. (Welf. & Inst. Code, §§ 366.26, 395.)[1] Father contends the juvenile court improperly suspended his visitation at the time the court set the section 366.26 hearing. Mother contends the juvenile court improperly denied her section 388 petition for modification seeking increased visitation for a nonrelative extended family member (NREFM), from which she also appealed, and

[1] Undesignated statutory references are to the Welfare and Institutions Code.

erred in finding the beneficial parental relationship exception to adoption does not apply. We conclude father is precluded from raising his contention because he did not first raise it in a petition for an extraordinary writ as required by section 366.26, subdivision (*l*). We also conclude mother lacks standing to complain about the minors' visitation with the NREFM and disagree with her other contention. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The minors in this case have been detained three times during their short lives due to their parents' substance abuse and ongoing domestic violence. In June 2016, E.M. (then age three) and A.M. (then age one), were placed into protective custody after law enforcement responded to a domestic violence incident. The parents had been intoxicated and father attacked mother, hitting her in the kidneys, arms and face, and breaking her nose. The minors heard the violence from the other room. Mother was taken to the hospital and father fled the residence, leaving the two young minors home alone.

When law enforcement arrived, they found E.M. feeding A.M. by squirting mustard into her mouth. The home was filthy and unsafe for children. Dirty diapers, old food, bug spray, bathroom cleaner, beer bottles, and beer cans were strewn about the residence. There was a can of RAID ant spray in the minors' stroller and the minors' beds were barely visible beneath piles of clothing. An additional room in the home had been used as a marijuana grow room and there was marijuana residue all over the floor which was accessible to the minors. A.M. tested positive for THC upon detention.

The minors presented as if the incident was a rather normal occurrence. The parents have a lengthy history of domestic violence and substance abuse. E.M. reported that her parents fought a lot and it made her afraid. After the minors were detained and the parents returned home, they engaged in another incident of domestic violence. Mother had been convicted a year earlier for driving under the influence with the minors

in the car. Mother also has a history of methamphetamine use and a prior conviction for sale and transportation of drugs. The parents requested John T., mother's uncle, be assessed for placement, as they are extremely close to him. John T. had been present and involved in the second incident of domestic violence in June 2016, after the minors had been taken into protective custody.

The El Dorado County Health and Human Services Agency (Agency) filed section 300 petitions on behalf of the minors based on parents' ongoing substance abuse and domestic violence, and the juvenile court took jurisdiction. The parents began participating in services pending disposition but, despite their participation, continued to abuse alcohol and engage in domestic violence.

The juvenile court declared the minors dependents of the court and ordered them removed from parental custody on October 11, 2016. The parents actively engaged in services and the minors were returned to their care in August 2017. Later that same month, however, the minors were detained again after father had a violent altercation with a family member while intoxicated and in the presence of the minors. Mother denied father had been intoxicated and let him back into the family home. Mother's substance abuse tests were coming back abnormal, and minor E.M. reported that mother was drinking alcohol on Fridays and Mondays.

The juvenile court sustained a section 387 supplemental petition based on father's conduct and, on October 13, 2017, returned the minors to mother with maintenance services and on the condition father not reside in the home. Father's services were terminated and he was permitted only supervised visitation, which were not to occur at mother's home or be supervised by mother.

On April 23, 2018, the Agency obtained protective custody warrants to again detain the minors from mother's care and custody. The Agency's supplemental section 387 petition alleged mother and father had engaged in domestic violence in front of the

minors. The incident occurred in mother's home and mother had known father was intoxicated and under the influence of a drug when he arrived. E.M. was also aware father was intoxicated and got into a fight with mother.

The Agency also discovered the parents had been dishonest regarding the status of their relationship and father's contact with the minors. On April 23, 2018, mother told the social worker that she had not had any physical contact with father since August 2017, other than an instance of seeing him at a store when he bought some diapers. Mother, however, was pregnant with father's child and gave birth in October 2018. Mother also gave various conflicting statements about her talking and texting with father. Mother's neighbors confirmed that father was regularly observed at mother's home, playing with the minors and fighting with mother.

Father continued to be verbally abusive and utilize controlling and manipulative tactics during calls from jail and mother continued to engage with him. At a hearing on June 1, 2018, the juvenile court found the section 387 petition true, removed the children from mother's custody, found mother's progress had been minimal and father's progress to have been none, terminated reunification services and set a section 366.26 hearing for September 26, 2018. Mother's visitation was reduced from twice a week to two supervised visits a month for a total of four hours a month. Father's visitation was terminated.

In September 2018, mother filed a section 388 petition for modification requesting the court "[i]ncrease visitation" between the minors and NREFM, John T., with a plan of placing the minors in his home after he has completed the resource family approval (RFA) process.[2] The petition alleged John T. "is beginning the RFA process and is

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[2] Although mother requested the court increase visitation, it does not appear there had ever been any court-ordered visitation between John T. and the minors.

willing and able to take both minors in[to] his home as foster children with the intention of adopting them." The petition further alleged the minors are bonded to him and know him as "Papa" or "Pops," and that he has provided care for them throughout their lives. The Agency was in the process of acclimating the minors to distant relatives in Oregon. The petition alleged that the proposed modification was in the minors' best interests because they were very bonded to John T., asked after visits to go home with him, and placement with him would permit continued contact with the minors' family members. Mother attached numerous letters and photographs to the petition, evidencing John T.'s bond with the minors. The juvenile court ordered a hearing on mother's section 388 petition, which was subsequently continued to be heard on October 17, 2018, just prior to the section 366.26 hearing.

At the October 17, 2018, hearing, the juvenile court received the CASA report, the Agency's section 366.26 report, and mother's exhibit into evidence. Mother's exhibit was described in the record as an unsigned "Resource Family Pre-approval training" document purporting to show that John T. had been going through the training process. The document appeared to reflect the date and trainer's initials for four sessions. Mother and the social worker both testified.

The minors had been moved seven times, including in and out of mother's home, since their initial detention two years earlier. Both minors were struggling in their school settings. E.M. struggled with dishonesty and her lies had caused conflicts with her peers. A.M. swore at her teacher, was observed to be excited and hyper, and often resorted to physical violence. Both minors, however, had improved since being placed in foster care and, with the assistance of counseling, E.M. had made "drastic improvements." Both minors were participating in weekly individual counseling.

The CASA worker reported that the instability of multiple placements over the previous two years had been difficult for the minors, especially E.M. E.M. had been

coached to lie in order to protect her parents and it had caused her great distress. The minors were doing okay in their current placement, but both minors exhibited behavioral problems, especially in social situations with their peers. The minors had supervised visits with mother every other week and visited other family members occasionally. They were "talking about their parents less and less." They had not mentioned father in "some time" and no longer asked when they could go back to mother's house.

The Agency had assessed John T. for placement of the children, as well as assessing at least six other relatives and NREFMs. The Agency had significant concerns about John T. in that he had a significant criminal history and it had been reported by other family members that he was a drug dealer. Additionally, he had been involved in the domestic violence between the parents that occurred in June 2016 and, due to his proximity, knew or should have known about the filthy condition of the home, including the marijuana grow, but failed to take any steps to protect the children. Further, despite evidence that mother had allowed father unauthorized contact with the minors throughout the two-year dependency proceedings, John T. never reported any concerns to the Agency. Ultimately, the Agency did not believe he prioritized the safety of the minors above his relationship with mother. The Agency also assessed that the parents were attempting to have the minors placed with local relatives in order to gain unlimited access to the minors, and that such a scenario would cause the minors harm and confusion.

The relatives the Agency had found most suitable for placement lived in Oregon. The minors had been visiting those relatives, the visits had been going well, and the relatives were interested in adopting them. They have another minor daughter and had already been in the process of becoming certified as an adoptive home when they learned about the circumstances of these minors. They are aware of, and equipped to address, the minors' emotional needs. They understood that the minors had formed relationships with extended family members in the Tahoe area and wanted the minors to maintain contact

with appropriate relatives. The minors were very affectionate toward the Oregon relatives, sat on their laps and gave them hugs. After the minors' most recent visit with the Oregon relatives, the minors' foster mother reported the minors "absolutely loved" spending the weekend with the Oregon relatives and that "real bonding is happening." Both during and after their visits with the Oregon relatives, the minors have stated they want to go to Oregon and see them.

The minors had been attending separate therapy sessions with counsellor Kate Mosher. According to Mosher, the minors' misbehavior could be an indication of depression. Mosher believed both minors to be sad and confused about what was going on with their family and living situation, and opined that they really need stability. E.M. often stated she wanted to live with some person or another, but usually identified different individuals from week to week.

The CASA worker agreed that what the minors need most is stability and a permanent home, and the sooner the better so the minors would be able to start to heal. They also needed someone who was prepared to deal with the minors' emotional and behavioral problems. She asked E.M. if she wanted to tell the judge anything and E.M. replied very quickly that she wanted to live with John T., whom she referred to as "Papa John," because she loved him. She also said she wanted to stay in Tahoe and not move to Oregon. The CASA worker said, however, that the response sounded rehearsed and was strange because, in the past, E.M. had always said she wanted to live with one of her parents. Mother and father had been known to coach the minors in the past. Additionally, neither the social worker, foster mother, or the minors' therapist had spoken to the minors about not going to live with their parents, moving to Oregon, or the possibility of living with John T. The CASA worker asked E.M. who told her she might move to Oregon, and E.M. did not answer.

The CASA worker opined that a placement in the Lake Tahoe area would provide the benefit of allowing the minors to maintain their relationships with other family members, and provide the comfort of familiar people, places and schools. On the other hand, she noted that the local family members were very close to the parents and she was concerned about the family members' ability to maintain appropriate boundaries with the parents and protect the minors from further exposure to the parents' domestic violence.

The juvenile court found mother had failed to meet the burden to warrant an evidentiary hearing on her section 388 petition for modification and proceeded with the section 366.26 hearing. It then heard further evidence and argument regarding the section 366.26 hearing.

Mother testified her visits with the minors had been reduced from once a week to twice a month in June 2018. During visits, they talked about school, peers, and day-to-day life. They also did homework together. Mother said E.M. asked her for advice, asked about other family members, and told mother she missed being at home. Sometimes E.M. started crying when she would discuss how she missed mother taking her to school, making breakfast, and doing other activities. A.M. talked about her daycare, crafts she had done, and about how she was completely potty trained. Mother also talked to the minors about hygiene. They had a birthday party for E.M. at the September 18, 2018, visit, which was attended by the minors' cousins, papas, and grandmother. E.M. cried at the end of the visit and told mother she wanted to go home with family.

The Agency, however, was concerned about the quality of mother's visits with the minors. Mother's visits were inconsistent. Sometimes she was attentive and loving. Other times she displayed an inappropriate attitude, was distracted and inattentive, spent a lot of time on her phone, and struggled to follow through with discipline techniques. Mother was reported to primarily use videos to entertain the minors during visits,

although she did also bring activities and interact with the minors. For example, during the July 24, 2018, visit, mother continually proposed they watch a movie even though the minors did not want to watch one, allowed A.M. to scream to gain attention, and allowed conflicts to escalate, sometimes until they became physical, before intervening. The social worker testified mother spent between a quarter to almost half of the visit time she observed having "screen time." Mother also brought in a video in violation of the court's orders in which father told the minors he loved and missed them, and would see them soon. The social worker believed the minors' relationship with mother was not a positive attachment but a relationship built on a history of trauma and exposure to domestic violence. The Agency assessed the minors as generally adoptable and recommended a plan of adoption.

The juvenile court found the minors adoptable, found no exceptions to adoption applied, and terminated parental rights. Parents appealed.

DISCUSSION

1.0 Suspension of Visitation

Father contends the juvenile court erred in suspending his visitation without a detriment finding. We conclude father is precluded from raising this claim because he failed to raise it in a petition for an extraordinary writ following the juvenile court's order setting the section 366.26 hearing at which the contested order was made.

"Section 366.26, subdivision (*l*) bars review of a [setting] order unless the parent has sought timely review by extraordinary writ." (*In re Rashad B.* (1999) 76 Cal.App.4th 442, 447, fn. omitted (*Rashad B.*).) The bar applies to all orders issued at a "hearing at which a setting order is entered." (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1023.)

An order setting a permanency planning hearing date cannot be appealed at any time unless the appellant previously filed a petition for extraordinary writ review raising the same issue. (§ 366.26, subd. (*l*)(1)(A)-(B); Cal. Rules of Court, rules 8.450 & 8.452.)

The failure to file a timely petition for writ review precludes any subsequent review of the findings and orders made pursuant to section 366.26, even if the contention relates only to contemporaneous orders that would otherwise be appealable. (See § 366.26, subd. (*l*)(2); *Rashad B., supra*, 76 Cal.App.4th at pp. 447-448; *Karl S. v. Superior Court* (1995) 34 Cal.App.4th 1397, 1403-1404 [time requirements are mandatory].)

Here, father was orally advised of the requirements for challenging the court's order by way of writ petition, along with the time frame for so doing, and was served by mail with the appropriate writ notices and forms. Father, however, failed to file a petition for extraordinary writ. By failing to seek review of the order suspending visitation in a timely manner by extraordinary writ, he is barred from challenging the order entered at that hearing in this appeal.

Father acknowledges these rules but argues they should not be applied because issues raised for the first time on appeal can be reached by this court if they involve important legal issues and are generally not forfeited[3] if they are pure questions of law. He cites no authority, however, for his proposition that these exceptions to general forfeiture rules circumvent the specific statutory mandate of section 366.26, subdivision (*l*). Further, while father may believe visitation with the minors was important to maintain their bond and possibly avoid termination of parental rights, he has not explained how his claim involved an important *legal* issue.

2.0 Petition for Modification Seeking Increased Visitation for NREFM

Mother argues the juvenile court erred in denying her petition for modification without a hearing. The change requested in her petition was to "[i]ncrease visitation

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3 "In dependency litigation, nonjurisdictional issues must be the subject of objection or appropriate motions in the juvenile court; otherwise those arguments have been [forfeited] and may not be raised for the first time on appeal." (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.) This rule extends to constitutional claims. (Cf. *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

between the minors and John [T.] with the plan of placing the children with [John T.] when he has completed the RFA process." The Agency argues that mother's petition failed to make a prima facie showing of changed circumstances since the NREFM, John T., was just " 'starting' the RFA process" and the proposed change was not in the minors' best interests. Notwithstanding the validity of the Agency's argument on these facts, the more rudimentary issue is that mother lacks standing.

Whether a person has standing to raise a particular issue on appeal depends upon whether the person's rights were injuriously affected by the judgment or order appealed from. (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1034-1035.) A person does not have standing to urge errors on appeal that affect only the interests of others. (*In re Gary P.* (1995) 40 Cal.App.4th 875, 877.) Accordingly, a parent is precluded from raising issues on appeal that do not affect his or her own rights. (*In re Jasmine J.* (1996) 46 Cal.App.4th 1802, 1806.)

In the context of the relative placement preferences, we recently explained that "[t]he section 361.3 relative placement preference requires 'preferential consideration' be given to a relative's request for placement of a dependent child. [Citation.] This section protects a relative's 'separate interest' in a relationship with the child. [Citation.] In contrast, a parent's interest in a dependency proceeding is in *reunifying* with the child. [Citations.] The parental interest in reunification is distinguished from a relative's 'separate interest' in preferential placement consideration or in having a relationship with the child. [Citation.] [¶] In view of this distinction, the court in *Cesar V.* held that a parent does not have standing to raise relative placement issues on appeal, where the parent's reunification services have been terminated. [Citation.] This is because decisions concerning placement of the child do not affect the parent's interest in reunification, where the parent is no longer able to reunify with the child." (*In re A.K.* (2017) 12 Cal.App.5th 492, 499; see *In re Isaiah S.* (2016) 5 Cal.App.5th 428, 435-436.)

Likewise, here, mother's reunification services had been terminated. Not only does mother have no interest in the possible future placement of the minors with the NREFM, she has no interest in his relationship or visitation with them. Having failed to establish that her rights and interests are injuriously affected by the failure to increase visitation for a NREFM, she lacks standing to raise the alleged error in denying the section 388 petition.

In his opening brief, father "adopts by reference" the arguments made by mother in her brief. For the same reason mother lacks standing to raise the failure to increase the NREFM's visitation, father also lacks standing.

3.0 Beneficial Parental Relationship Exception

Mother also contends the juvenile court erred by failing to find the beneficial relationship exception to adoption applied based on her regular visitation and bond with the minors. Father "adopts" this argument, as well. We find no error.

At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must choose one of the several " 'possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption.* [Citation.]' [Citations.] If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child." (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.)

There are only limited circumstances that permit the court to find a "compelling reason for determining that termination [of parental rights] would be detrimental to the child . . . ." (§ 366.26, subd. (c)(1)(B).) One such circumstance is when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

To prove that the beneficial parental relationship exception applies, the parent must show there is a significant, positive, emotional attachment between the parent and child. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) And even if there is such a bond, the parent must prove that the parental relationship " 'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.' " (*In re S.B.* (2008) 164 Cal.App.4th 289, 297, quoting *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575; accord, *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1345.) "In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, at p. 575.) On the other hand, " '[w]hen the benefits from a stable and permanent home provided by adoption outweigh the benefits from a continued parent/child relationship, the court should order adoption.' " (*In re Jasmine D.*, at p. 1350; *In re Autumn H.*, at p. 575.) "Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.*, at p. 1350.)

Here, mother did not meet her burden to establish the type of significant, positive relationship, the severing of which would be greatly harmful, so as to overcome the preference for adoption. While mother visited the minors regularly, the interactions were not always positive. Mother was often inattentive and disengaged. She also allowed conflict to escalate, sometimes to the point of physical violence. She had coached and manipulated E.M. to lie to protect her and father and, apparently, to request placement

with the parents' individual of choice, causing E.M. much distress. Both minors suffered from emotional and behavioral problems due to the instability and violence they were exposed to by mother, with E.M. still struggling with dishonesty and A.M. with defiance and physical aggression.

The minors' therapist and the CASA worker agreed that the minors were in great need of stability. The minors had been removed from mother's custody on three occasions and moved seven times since their initial detention. This instability—comprising a third of E.M.'s life and two-thirds of A.M.'s life—has been hard on the minors. Moreover, the time they *had* spent with parents had been fraught with episodes of domestic violence, exposure to substance abuse, frequent lies and deception, and filthy living conditions. While they had asked to return home at the beginning of these proceedings, they were no longer asking and, in fact, talked about the parents less and less, to the point of barely mentioning them at all. There was also no indication that the minors suffered any negative effects from the reduction of mother's visitation to two supervised visits a month or that they were asking to visit more.

In sum, the record supports the juvenile court's finding that the minors' relationship with mother did not rise to the type of substantial, positive, and emotional attachment that would cause the minors great harm if severed and did not outweigh the benefits of a stable and permanent home.

DISPOSITION

The orders of the juvenile court are affirmed.

s/BUTZ, Acting P. J.

We concur:

s/HOCH, J.

s/KRAUSE, J.